Supreme Court, U. S.
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In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1503

HECTOR G. RODRIGUEZ MARTINEZ, ET ALS.,
PETITIONERS,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

SALVADOR ANTONETTI
HARRY ANDUZE MONTANO
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HECTOR G. RODRIGUEZ MARTINEZ, ET ALS.,
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v.

UNITED STATES OF AMERICA,
RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

The petitioners, Hector G. Rodriguez Martinez, Moises Benmaman, Zoraida Quintana De Lara, Frederic J. Gonzalez, Walter Nieves Maldonado, Jesus Rivera Otero and Emilio Ramirez Kohl, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals For The First Circuit entered on the 8th day of January, 1980, and the opinion of the Court of Appeals For The First Circuit denying reconsideration while modifying its prior decision which was entered on February 4, 1980. Both of these decisions affirmed the decision of the United States District Court For The District of Puerto

Rico entered on the 23rd day of July, 1979, which refused to dismiss this action against all petitioners because of former jeopardy.

Opinions Below

The opinions of the court below were not reported, and are included in the Appendix.

Jurisdiction

The final judgment on rehearing was entered on February 4, 1980. The jurisdiction of this Court is invoked under the provisions of 28 U.S.C. §1252(1).

Constitutional Provisions Involved

Amendment V

No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process or law; nor shall private property be taken for public use, without just compensation.

Questions Presented

I. Is Retrial Barred by the Double Jeopardy Clause of the Fifth Amendment to the Constitution of the United States When a Mistrial Is Declared Because the Prosecutor's Remarks During Closing Argument Infringed Upon the Defendants' Right To Remain Silent?

II. Are Appellants' Due Process Rights Violated When They and the District Judge Relied on a Longstanding Rule Promulgated by the Court of Appeals For The First Circuit and the Latter Court Changes the Rule *a Posteriori* on Appeal?

Statement of the Case

Prior Proceedings:

On June 7, 1979, during the prosecutor's summation in a case entitled *United States* v. *Hector G. Martinez Rodriguez, Et Al.*, a mistrial was declared. On June 12, 1979, the district court ordered a new trial and defendants timely moved to dismiss the indictment on the ground of double jeopardy. The motion was denied on July 23, 1979 and an appeal was taken to the United States Court of Appeals for the First Circuit. The Court of Appeals summarily affirmed the decision by a *per curiam* order entered on January 8, 1980. A timely petition for rehearing was denied on February 4, 1980, but the Court of Appeals modified its former opinion by adding a footnote.

Relevant Facts:

Defendants had been charged with perjury, obstruction of justice and conspiracy to commit perjury and obstruct justice. The charges revolved about alleged grand jury testimony concerning "kickbacks" to union officials for medical services. It was also alleged that hospital records were altered prior to submission to the grand jury. During the trial, the government relied heavily upon the testimony of two former associates of the defendants.

At the end of the lengthy trial, the prosecutor in summation referred to the testimony of these key witnesses as reliable because they were people who "knew" because they

"were there". Later on, the prosecutor referred to this testimony as "uncontroverted". There was no doubt that only the defendants who were the other people who "were there" were the only persons who could have controverted this testimony. The defendants did not testify at trial and the prosecutor's statement was an undisguised attack on the defendants' silence.

Noticing that the trial judge did not intervene, counsel for defendants asked for permission to approach the bench to bring the prosecutor's misconduct to the court's attention.

After verifying that in fact the prosecuor had made the improper remark, the court, referring to a decision of the Court of Appeals dealing with this situation but not having the case at hand and not knowing the effect of it, the trial judge stated "Are you asking for a mistrial?" and was told by a counsel "Yes, your Honor, I am". Immediately, another counsel advised the trial court of its alternatives and the judge ordered a brief recess. With the aid of defense counsel, the trial judge found the rule of the Court of Appeals in *United States* v. *Flannery,* 451 F.2d 880 (1st Cir. 1971).

After the recess, and government's argument, defense argued that the focus of the court was being diverted from the reliance that defense had made on the *Flannery* rule. Defense argued that it was so important to follow what the court said in *Flannery* "that from now on, from now on this is going to be grounds for reversal. And we are going to establish one single exception and that single exception is going to be valid only when the court, using its full authority as the judiciary arm of the government, as the arbitrator between the parties, interjects immediately."

The court was further urged ". . . the First Circuit says that it does this because it does it in its role as a supervisory power over the courts of this district."

The court itself ruled that ". . . it is presumed that counsel for the defense have read the case of *Flannery* where it says, hereafter as to cases tried after the date of this opinion, when it is apparent on the record that there was no one other than himself whom the defendant could have called to contradict the testimony, we shall not endeavor to weigh prejudice. They don't care to weigh prejudice. They are going to say this: We shall rule it prejudicial as a matter of law."

Reasons for Granting the Writ

I. Certiorari Should Be Granted Pursuant to the Provisions of 28 U.S.C. §1254(1) and Rule 16(b) of the Rules of the Supreme Court Because the Decision of the Court of Appeals Is Contrary to the Decisions of This Honorable Court Which Hold That the Double Jeopardy Clause Bars a Retrial After a Mistrial Provoked by Bad Faith Governmental Action Directed To Prejudice Defendants.

II. The Court of Appeals So Far Departed From the Accepted and Usual Judicial Rule Promulgated by the Court of Appeals Itself as To Call for an Exercise of This Court's Power of Supervision in That It Changed a Prophylactic Rule of Almost Ten Years' Standing After It Had Been Relied Upon by Appellants and the District Court.

Argument

I. Retrial of Petitioners Is Barred Because the Prosecutor's Comments, Made in Bad Faith and With Intent To Prejudice, Infringed Upon Defendants' Right To Remain Silent.

During closing argument at the end of a month-long trial in this case, the prosecutor made a comment which the court, after a recess, found in violation of the rule set forth

by the Court of Appeals for the First Circuit in *United States* v. *Flannery, supra,* which forbids prosecutors from arguing that evidence against a defendant is "uncontroverted" when only the defendant could controvert that evidence by taking the stand.

A mistrial was then ordered by the Court, the case was reset for trial and defendants' plea of double jeopardy was rejected.

The Court of Appeals affirmed the district court's finding that the comment, in context, was not made in bad faith and was not serious so as to assure a conviction. The comments were characterized by the Court of Appeals as an act of negligence permitting a new trial.

The Court of Appeals also stated that a new trial would be barred only if the prosecutor's error stemmed from bad faith, an effort to harrass or prejudice, or an attempt to provoke a mistrial, citing this Honorable Court's cases of *United States* v. *Scott,* 437 U.S. 82, 94 (1978); *Lee* v. *United States,* 432 U.S. 23, 33-34 (1977) and *United States* v. *Dinitz,* 424 U.S. 600, 611 (1976).

The underlying principle in double jeopardy cases is the preservation of the defendants' "primary control over the course to be followed in the event of [such] error." *Dinitz, supra,* at 609, and only when the prosecutor's action is such that it prevents such control or makes defendant's choice meaningless will a retrial be barred.

While the comments were characterized by the trial court as not made in bad faith and not too serious as to assure a conviction when it denied the motion to bar a retrial, nevertheless during argument the same court conceded:

> "We all agree that the remarks were serious as to the infringement of the defendants' Fifth Amendment right to remain silent . . ."

When it released the jury, the court stated:

> ". . . probably your minds are tainted, are affected in such a way that you are not able to render a fair and just verdict."

It is petitioners' contention that comments so characterized by the court at the time of trial, assured a conviction and were highly prejudicial so as to bar retrial.

That they were made in bad faith and were more than mere negligence, is borne out by the fact that they were made in complete disregard of the clear rule set forth by the Court of Appeals for the First Circuit.

The misconduct complained of here was the prosecutor's deliberate and undisguised comment on the rights of the accused to remain silent. That such comment is severely prejudicial, and that such a comment could be motivated by nothing short of intentional misconduct or gross negligence is conclusively established by the existence of the decision in *United States* v. *Flannery, supra.* In *Flannery,* the Court of Appeals for the First Circuit, exercising its supervisory authority over the court within its jurisdiction, repeated the "obvious conclusion" that such comments are prejudicial and unconstitutional, and held that in all future cases arising in the First Circuit, such comments would be held prejudicial as a matter of law. 451 F.2d at 882. The *per se* rule adopted in *Flannery* was necessitated because "government attorneys, either uninstructed or unmindful of their instructions", *id.,* had persisted in ignoring the oft-repeated rulings of the court on the defendants' constitutional right to remain silent. Were the instant case to have arisen before or immediately after *Flannery,* the prosecution's comments could be explained by understandable, though reprehensible, neglect in failing to keep abreast of the law. But, faced with a decision asserted and reasserted for nearly a decade, holding that comments such

as these are prejudicial *per se*, see, e.g., *Morgan* v. *Hall*, 569 F.2d 1161, 1167 (1st Cir. 1978), *cert. denied*, 437 U.S. 910, 98 S.Ct. 3103 (1978); *United States* v. *Goldman*, 563 F.2d 501, 504 (1st Cir. 1977), *cert. denied*, 434 U.S. 1967 (1977); *Lussier* v. *Gunter*, 552 F.2d 385, 389, fn. 2 (1st Cir. 1977), *cert. denied*, 434 U.S. 854 (1977); *United States* v. *Medina*, 455 F.2d 209, 211 (1st Cir. 1972), it is impossible to conceive how such comment could have been made unless the prosecution was grossly negligent or intent on sabotaging its own case.

The sequence of events at the trial evinced a clear intent by the prosecutor to make the unwarranted comments because:

a) The prosecutor was reading his summation from a prepared written text;

b) The prosecution had requested an instruction that the jury might consider defendants' failure to call certain witnesses, which request was denied by the district court on the grounds that since defendants had presented no evidence and had not taken the stand, such an instruction would be unduly prejudicial;

c) The prosecution argued that the comment was proper and was called for in the prosecutor's manual.

II. Petitioners' Due Process Rights Were Violated When the Court of Appeals Changed a Rule of Judicial Procedure Which Had Been Relied Upon by the District Court.

The district court relied upon a line of cases of the Court of Appeals for the First Circuit which set forth the prophylactic rule that any reference by prosecutors to the uncontroverted nature of the evidence (where only the defendant could have controverted the evidence) would be considered prejudicial *per se* and would result in reversal

of any conviction. As the sole exception to the rule requiring reversal, the Court of Appeals held that reversal could be avoided only where the court, immediately and *sua sponte*, interrupts the argument, instructs the jury fully on defendants' right to remain silent and the jury's obligation not to draw unfavorable inferences and, in addition, states to the jury that the United States Attorney was guilty of misconduct. *United States* v. *Flannery, supra, Lussier* v. *Gunter, supra.*

Based on *Flannery* and *Lussier, supra,* the district court declared a mistrial.

In its memorandum and order entered in this case on February 4, 1980, the Court of Appeals stated that the *sua sponte* requirement of *Flannery* and *Lussier* did not really mean *sua sponte* and that prompt curative instructions could be given either by the court on its own initiative, or prompted by counsel.

In fact, the Court of Appeals modified the rule *a posteriori.* The district court applied the rule as it stood at the time of trial.

Had counsel for petitioners not alerted the trial court to the prosecutor's improper remarks, any of the petitioners who might have been convicted after trial, would have had their convictions automatically reversed on appeal by invoking *Flannery.* The mistrial provoked by the prosecutor's violation of the *Flannery* Rule should have resulted in an end to the prosecution, had not the Court of Appeals changed the rules of the game, after the fact.

This departure from a long-standing course of judicial conduct violated petitioners' rights to due process of law and calls for an exercise of this Court's power of supervision over lower federal courts.

The Court of Appeals erroneously denied petitioners' appeal in spite of a clear record showing deliberate prosecutorial misconduct, infringing upon petitioners' right to remain silent.

Conclusion

This Honorable Court should issue a writ of certiorari to the Court of Appeals of the First Circuit ordering that court to order the United States District Court for the District of Puerto Rico to dismiss the indictment against petitioners.

Respectfully submitted,

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APPENDIX A

United States Court of Appeals
For the First Circuit

No. 79-1394.

UNITED STATES OF AMERICA,
APPELLEE,
v.
MOISES BENMAMAN,
DEFENDANT, APPELLANT.

No. 79-1399.

UNITED STATES OF AMERICA,
APPELLEE,
v.
HECTOR G. RODRIGUEZ-MARTINEZ.
DEFENDANT, APPELLANT.

No. 79-1400.

UNITED STATES OF AMERICA,
APPELLEE,
v.
ZORAIDA QUINTANA DE LARA,
DEFENDANT, APPELLANT.

No. 79-1401.

UNITED STATES OF AMERICA,
APPELLEE,
v.
FREDERICK J. GONZALEZ,
DEFENDANT, APPELLANT.

No. 79-1402.

UNITED STATES OF AMERICA,
APPELLEE,
v.
WALTER NIEVES-MALDONADO,
DEFENDANT, APPELLANT.

No. 79-1403.

UNITED STATES OF AMERICA,
APPELLEE,
v.
JESUS RIVERA OTERO,
DEFENDANT, APPELLANT.

No. 79-1509.

UNITED STATES OF AMERICA,
APPELLEE,
v.
EMILIO RAMIREZ KOHL,
DEFENDANT, APPELLANT.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO
[HON. HERNAN G. PESQUERA; *U.S. District Judge*]

Before
COFFIN, *Chief Judge*,
CAMPBELL, *Circuit Judge*,
BOWNES, *Circuit Judge*.

Harry Anduze Montano, Salvador Antonetti, Carlos M. Mangual Lopez, James A. Toro, Carlos V. Garcia Gutierrez, John Garcia, and *Harvey B. Nachman,* on brief for appellants.

Julio Morales Sanchez, United States Attorney, *Pedro J. Durand,* Special Attorney, Department of Justice, *William C. Bryson* and *Terence J. Lynam,* Attorneys, Department of Justice, on brief for appellee.

January 8, 1980

PER CURIAM. Contrary to the repeated misrepresentations in appellants' brief, the transcript in this case demonstrates that defendants moved and pressed for a mistrial over the government's objection. The district court granted the motion reluctantly and only after much deliberation. In such circumstances, the Double Jeopardy Clause bars a new trial only if the prosecutor's claimed error stemmed from bad faith, an effort to harass or prejudice, or an attempt to provoke a mistrial. *United States* v. *Scott,* 437 U.S. 82, 94 (1978); *Lee* v. *United States,* 432 U.S. 23, 33-34 (1977); *United Statesa* v. *Dinitz,* 424 U.S. 600, 611 (1976). Here the district court supportably found "that the comment made by the prosecuting attorney in its context was not made in bad faith and was not so serious as to assure a conviction." The comment was therefore the kind of "act of negligence," *Lee, supra,* 432 U.S. at 34, permitting a new trial.

Pursuant to 1st Cir. R. 12, the order of the district court is summarily affirmed.

United States Court of Appeals
For the First Circuit

No. 79-1394.

UNITED STATES OF AMERICA,
APPELLEE,
v.
MOISES BENMAMAN,
DEFENDANT, APPELLANT.

No. 79-1399.

UNITED STATES OF AMERICA,
APPELLEE,
v.
HECTOR G. RODRIGUEZ-MARTINEZ.
DEFENDANT, APPELLANT.

No. 79-1400.

UNITED STATES OF AMERICA,
APPELLEE,
v.
ZORAIDA QUINTANA DE LARA,
DEFENDANT, APPELLANT.

No. 79-1401.

UNITED STATES OF AMERICA,
APPELLEE,
v.
FREDERICK J. GONZALEZ,
DEFENDANT, APPELLANT.

No. 79-1402.

UNITED STATES OF AMERICA,
APPELLEE,
v.
WALTER NIEVES-MALDONADO,
DEFENDANT, APPELLANT.

No. 79-1403.

UNITED STATES OF AMERICA,
APPELLEE,
v.
JESUS RIVERA OTERO,
DEFENDANT, APPELLANT.

No. 79-1509.

UNITED STATES OF AMERICA,
APPELLEE,
v.
EMILIO RAMIREZ KOHL,
DEFENDANT, APPELLANT.

MEMORANDUM AND ORDER
Entered February 4, 1980

Upon consideration of the petition for reconsideration, the same is hereby denied.

It is further ordered that the opinion of January 8, 1980 in this case be amended by appending the following footnote to the last word of line 16.

* The district court granted a mistrial in the belief that it had not complied with this circuit's requirement of a prompt curative instruction where a prosecutor has commented on a defendant's failure to testify. *See United States* v. *Flannery*, 451 F.2d 880, 882 (1st Cir. 1971). In *Lussier* v. *Gunter*, 552 F.2d 385, 389 n.2 (1st Cir.), *cert. denied*, 434 U.S. 854 (1977), we declined to extend to state habeas corpus cases the *Flannery* rule that such an uncorrected comment was an automatic ground for reversal. In dicta, we stated that in *Flannery* we had "announced that in future cases we would

reverse a conviction where, after a prosecutorial comment on a defendant's silence, the trial judge did not immediately and *sua sponte* interrupt the argument to admonish the prosecutor and instruct the jury." 552 F.2d at 389 n.2. In the present case, the trial judge understood this language to preclude a legally effective curative instruction where counsel, rather than the court *sua sponte,* noticed the prosecutor's comment. We wish to make it clear that *sua sponte* action is contemplated under *Flannery* only where counsel has failed to object or make a request; the prosecutor's misconduct can be cured by a prompt and proper instruction whether rendered *sua sponte* or in response to counsel's objection or request. When speaking in *Lussier* v. *Gunter* of the need to interrupt the argument *sua sponte,* we merely meant to repeat what was said in *Flannery,* to the effect that the prosecution's misconduct calls for prompt curative instructions which must be given *whether or not* counsel thinks to ask for them.

It is further ordered that the opinion as amended be circulated to the judges of this circuit.

By the Court:
DANA H. GALLUP, *Clerk.*
BY (s) FRANCIS P. SCIGLIANO
Chief Deputy Clerk.

[cc: Messrs. Bryson, Antonetti, Toro, Mangual Lopez, Garcia-Gutierrez, Anduze Montano, Nachman, Visconti, and Garcia.]

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

CR. No. 78-185

UNITED STATES OF AMERICA
v.
HECTOR RODRIGUEZ MARTINEZ, ET AL

OPINION AND ORDER

The defendants herein are charged with having conspired, 18 USC 371, "to corruptly endeavor to influence, obstruct and impede the due administration of justice by delivering and causing to be delivered to the federal grand jury documents and records of Hospital Sagrado Corazon which contained false statements [18 USC 1503] and to knowingly make false material declarations while under oath as a witness before the federal grand jury [18 USC 1623]". All of the defendants are charged in the conspiracy count, and separate counts have been charged to each defendant, or defendants, for the substantive offenses, 18 USC 1503 and 1623.

For a period of approximately five weeks of trial (from May 8, 1979 to June 7, 1979) the government presented its evidence. At the end of the government's case the defendants opted not to present any evidence and relied on the burden imposed upon the government to prove all elements of the offenses charged beyond a reasonable doubt. During summation, the prosecuting attorney referred to the testimony given by two of the government's witnesses (the unindicted co-conspirators) as being uncontroverted.[1] The statement was not heard by the Court;

---

[1] See transcript of June 7, 1979, pages 13-14 wherein the Special Prosecuting Attorney stated that:

however, counsel for the defense approached the bench and informed the Court that the government's comment was a "highly impermissible" statement, as the same constituted an unconstitutional transgression of defendants' right to remain silent. Counsel for the defendants requested that a mistrial on account of the government's action be ordered or in the alternative, that a curative instruction be given and that the Court admonish government's counsel for said misconduct. The Court was aware at the time of a First Circuit decision on the point raised by defendants' counsel but could not remember the remedies provided in the same. Therefore, the Court recessed in order to properly research the problem. The research was done to a great extent with the aide of defendants' counsel since the library facilities at the Federal Judicial Center in Hato Rey (where the Court has convened due to construction work being performed at the Old San Juan Courtroom) are very limited.

The Court, after reading *United States* v. *Flannery*, 451 F2d 880 (1st Cir., 1971) and its progeny[2] reconvened the proceedings and heard arguments by both the government's attorneys and the defense counsel regarding the

"On March 1st, 1978, and again falsely testified as to the board meeting which never took place. That he had not signed all the receipts at the same time or during August of 1977, that he was not present when other doctors signed the receipts and he also referred to the receipts which he had signed, which falsely represented the receipt of cash for back salaries.

The testimony of Dr. Roura and Dr. Carrasquillo which has not been controverted clearly shows us that these statements were not true. And the receipts falsely show what they were purporting to show, that is payment for the back salaries." (Emphasis ours)

[2] *United States* v. *Medina*, 455 F2d 209 (1st Cir., 1971); *U. S.* v. *Kubitsky*, 469 F2d 1253 (1st Cir., 1972); *U. S.* v. *Farnkoff*, 535 F2d 661, 668 (1st Cir., 1976); *Lussier* v. *Gunter*, 552 F2d 385 (1st Cir., 1977).

defendants' request for a mistrial. The government contended that a cautionary instruction would suffice, but defendants' counsel argued strongly in favor of a mistrial.[3] The Court expressed its concern over such a drastic measure as declaring a mistrial. However, was convinced, mainly by defendants' counsel's arguments, that it had no other alternative under the strength of the decisions by the First Circuit Court of Appeals in *United States* v. *Flannery, supra,* and *Lussier* v. *Gunter,* 552 F2d 385, 389, N. 2 (1st Cir., 1977), but to declare a mistrial.

The Court in *Flannery* held the following:

> "In 1965 we held that for the government to say, in summation to the jury, that certain of its evidence was 'uncontradicted', when contradiction would have required the defendant to take the stand, drew attention to his failure to do so, and hence was unconstitutional comment. *Desmond* v. *United States*, 1 Cir., 1965, 345 F.2d 225. We do not adopt the reasoning of those courts which state, it seems to us, ingenuously, that to say that the government witnesses' testimony was uncontradicted is simply a statement of historical fact. There are many 'facts' which are benign in themselves. The difficulty is that such reference, when only the defendant could have contradicted, clearly calls to the jury's mind the fact that he failed to testify. In spite of frequent repetition of this, what would seem to us obvious conclusion, government attorneys, either uninstructed, or unmindful of their instructions, have persisted in ignoring our ruling. In some published cases we have found prejudice and reversed. In others, for special reasons, as when the Court was quick to correct the error, we have found

[3] Compare with *United States* v. *Evers*, 569 F2d 876 (5th Cir., 1978).

> no prejudice. As early as *Desmond,* however, we expressed our belief that the government would not make such a comment, thereby risking reversal, unless it thought the comment effective. Its persistence in so doing, despite admonitions by trial judges as well as ourselves, produces a sense of futility. Hereafter, as to cases tried after the date of this opinion, when it is apparent on the record that there was no one other than himself whom the defendant could have called to contradict the testimony, we shall not endeavor to weigh prejudice, but shall rule it prejudicial as matter of law, with a single exception. If the court interrupts the argument, instructs the jury fully on the defendant's constitutional right not to testify and the jury's obligation not to draw unfavorable inferences and, in addition, states to the jury that the U.S. Attorney was guilty of misconduct, we may find no prejudice; otherwise we will reverse." (Footnotes omitted)

Such holding was interpreted in *Lussier* v. *Gunter, supra,* as "[announcing] that in future cases we would reverse a conviction where after a prosecutorial comment on a defendant's silence, the trial judge did not immediately and *sua sponte* interrupt the argument to admonish the prosecutor and instruct the jury". It thus appears that in order for the "single exception" to the *Flannery* Rule to become operative, and cure the prejudice so as not to entail the declaration of a mistrial, three requirements must be met: first, that the Court immediately and *sua sponte* interrupts the argument; secondly, that the Court instructs the jury on the defendant's constitutional right not to testify and on the jury's obligation not to draw unfavorable inferences therefrom; and, thirdly, that the Court admonishes the prosecuting attorney for being guilty of misconduct.

Since the Court did not interrupt *sua sponte* the prosecuting attorney's summation argument when the prejudicial comment was made, but it was counsel for the defendants that had to call the Court's attention to the same; then, it was precluded from giving the cautionary instruction carved out from *Flannery* as the "single exception" to the mandatory declaration of a mistrial when a defendant's constitutional right to remain silent is commented by the prosecution. Accordingly, a mistrial was declared; and the Court then proceeded to set the case for retrial, however, defendants have moved the Court to dismiss the indictment alleging that the same is precluded by the Double Jeopardy Clause of the Fifth Amendment to the Constitution of the United States.

The general principles regarding the applicability of the Double Jeopardy Clause to situations wherein a mistrial has been declared have been made clear by recent decisions of the Supreme Court. (See 77 ALR 3d 1143). The bar of the double jeopardy clause protects an accused against multiple prosecutions for the same offense. *Barks* v. *United States,* 437 US 1 (1978). Once jeopardy attaches[4] a defendant has a "valued right to have his trial completed by a particular tribunal, . . .". *Wade* v. *Hunter,* 336 US 684, 689 (1949); *United States* v. *Jorn,* 400 US 470, 481 (1971); *Illinois* v. *Somerville,* 410 US 458, 466 (1973); *Arizona* v. *Washington,* 434 US 497, 503 (1978). Notwithstanding, a defendant's right to have his trial completed is not absolute. Since the threshold decision in *United States* v. *Perez,* 9 Wheat (22 US) 579 (1824) it was established that the double jeopardy clause does not bar a new trial after a mistrial has been declared when there is a "manifest necessity" for such a declaration or "the ends

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[4] Jeopardy attaches at the empaneling and swearing in of the jury. *Crist* v. *Bretz,* 437 US 28 (1978); *Downum* v. *United States,* 372 US 734 (1963).

of public justice would otherwise be defeated". *Arizona* v. *Washington*, 434 US 506.[5] Ordinarily, a mistrial declared upon a defendant's request or with his consent will not bar his retrial. *United States* v. *Scott*, 437 US 82, 93 (1978); *Lee* v. *United States*, 432 US 23, 32 (1977). The fundamental policy of the double jeopardy clause is to prevent "government-induced" multiple prosecutions for the same crime. *United States* v. *Scott*, 437 US 92. The Supreme Court has recognized that there may be situations when a defendant requests a mistrial and a retrial would be barred by the double jeopardy clause. Such situations arise when there has been "prosecutorial overreaching" and a defendant is left with no other reasonable choice but to request a mistrial. *United States* v. *Jorn*, 400 US 470 (1971); *United States* v. *Dinitz*, 424 US 600 (1976); *United States* v. *Kessler*, 530 F2d 1246 (5th Cir., 1976). The leading case is the Supreme Court decision in *U. S.* v. *Dinitz, supra*, at page 608, wherein the Court held that:

> "The distinction between mistrials declared by the Court *sua sponte* and mistrials granted at the defendant's request or with his consent is wholly consistent with the protections of the Double Jeopardy Clause. Even when judicial or prosecutorial error prejudices a defendant's prospects of securing an acquittal, he may nonetheless desire "to go to the first jury and, perhaps, end the dispute then and there with an acquittal". *United States* v. *Jorn, supra*, at 484. Our prior decisions recognize the defendant's right to pursue this course in the absence of circumstances of manifest necessity requiring a *sua sponte* judicial declaration of mistrial. But it is evident that when

[5] Requirement of a "high degree" of necessity to order a mistrial becomes operative when the defendant objects to the same. *Unitd States* v. *Pierce*, 593 F2d 415, 417 (1st Cir., 1979) and cases cited therein; *Sedgwick* v. *Superior Court for the District of Columbia*, 584 F2d 1044 N. 5 (D.C. Cir. 1978).

> judicial or prosecutorial error seriously prejudices a defendant, he may have little interest in completing the trial and obtaining a verdict from the first jury. The defendant may reasonably conclude that a continuation of the tainted proceeding would result in a conviction followed by a lengthy appeal and, if a reversal is secured, by a second prosecution. In such circumstances, a defendant's mistrial request has objectives not unlike the interests served by the Double Jeopardy Clause—the avoidance of the anxiety, expense, and delay occasioned by multiple prosecutions."

A finding of prosecutorial overreaching requires that the prosecutor's misconduct be the result of gross negligence, intentional misconduct; *United States* v. *Crouch*, 566 F2d 1311, 1318 (5th Cir., 1978), or bad faith. *U. S.* v. *Rumpf*, 576 F2d 818, 822 (10th Cir., 1978). Mere negligence is not enough. *U. S.* v. *Crouch*, 566 F2d 1318 N 9. The misconduct must be so serious that the defendant must move for a mistrial as the only alternative to an assured conviction. *United States* v. *Bobo*, 586 F2d 355, 365 N. 11 (5th Cir., 1979), Cf. *United States* v. *Kessler, supra.*

The comment made by the prosecuting attorney was made in a low-keyed, monotonous voice. As stated before, the record will reflect that this Court did not hear the statement. Also, the comment was made after the prosecuting attorney had already gone over the evidence presented at trial against several of the defendants, and which had already included referring to Dr. Roura's and Dr. Carresquillo's testimony, but had not referred to their testimony as being uncontroverted. The statement was made only once and in a dispassionate manner. The Court thus believes that the comment made by the prosecuting attorney in its context was not made in bad faith and was not so serious as to assure a conviction. *U. S.* v. *Goldman*, 563 F2d 501, 505 (1st Cir., 1977); *U. S.* v. *Nelson*, 582 F2d

1246 (10th Cir., 1978); *United States* v. *MacDonald,* 455 F2d 1259, 1262 (1st Cir., 1972) The Court, however, ordered the mistrial based on its interpretation of the *Flannery* rule established by the First Circuit in the exercise of its supervisory powers and not because it felt that the defendants had been gravely prejudiced.[6]

Therefore, the Court finds that the mistrial was properly declared as the same was ordered after due consideration of the available alternatives and correct interpretation of the law.[7] Consequently, a retrial of the defendants is not barred by the double jeopardy clause. *United States* v. *MacQueen*, 596 F2d 76, 82 (2d Cir., 1979).

In view of the foregoing, defendants' motion to dismiss the indictment is hereby DENIED.

SO ORDERED.

San Juan, Puerto Rico, July 22, 1979.

(s) HERNAN G. PESQUERA
U.S. District Judge

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[6] See *Illinois* v. *Somerville,* 410 US 458, 465 (1973) wherein the Court held that "(a) trial judge properly exercises his discretion to declare a mistrial if an impartial verdict cannot be reached, *or if a verdict of conviction could be reached but would have to be reversed on appeal due to an obvious procedural error in the trial . . .*". (Emphasis ours)

[7] See: *United States* v. *Klein,* 582 F2d 186, 191, 195 (2d Cir., 1978); *United States* v. *Nelson,* 582 F2d 1246; 1249 (10th Cir., 1978); *United States* v. *McKoy,* 448 F. Supp. 826, 831 (E.D. Pa., 1978) and compare with *United States* v. *Starling*, 571 F2d 934, 941 N. 10 (5th Cir., 1978).

APPENDIX C

United States Court of Appeals
For the First Circuit

No. 79-1394.

UNITED STATES OF AMERICA,
APPELLEE,
v.
MOISES BENMAMAN,
DEFENDANT, APPELLANT.

No. 79-1399.

UNITED STATES OF AMERICA,
APPELLEE,
v.
HECTOR G. RODRIGUEZ-MARTINEZ,
DEFENDANT, APPELLANT.

No. 79-1400.

UNITED STATES OF AMERICA,
APPELLEE,
v.
ZORAIDA QUINTANA DE LARA,
DEFENDANT, APPELLANT.

No. 79-1401.

UNITED STATES OF AMERICA,
APPELLEE,
v.
FREDERICK J. GONZALEZ,
DEFENDANT, APPELLANT.

No. 79-1402.

UNITED STATES OF AMERICA,
APPELLEE,
v.
WALTER NIEVES-MALDONADO,
DEFENDANT, APPELLANT.

No. 79-1403.

UNITED STATES OF AMERICA,
APPELLEE,
v.
JESUS RIVERA OTERO,
DEFENDANT, APPELLANT.

No. 79-1509.

UNITED STATES OF AMERICA,
APPELLEE,
v.
EMILIO RAMIREZ KOHL,
DEFENDANT, APPELLANT.

ORDER OF COURT
Entered February 14, 1980

Upon consideration of motion of appellants requesting stay of Mandate,

It is ordered that said motion is hereby denied.

By the Court:

(s) DANA H. GALLUP, *Clerk.*

[cc: Bryson, Antonetti, Toro, Mangual Lopez, Garcia-Gutierrez, Anduze Montano, Nachman and Garcia.]